



The Supreme Court Bets Against Commandeering: *Murphy v. NCAA*, Sports Gambling, and Federalism

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The Supreme Court recently held in *Murphy v. NCAA* that a federal law prohibiting states from “authorizing” sports gambling unconstitutionally “commandeered” the authority of state legislatures. In an opinion authored by Justice Alito (and joined by six other justices in its central holding), the Court explained that because the [Professional and Amateur Sports Protection Act of 1992 \(PASPA\)](#) “unequivocally dictates what a state legislature may and may not do” with respect to sports gambling, it impermissibly placed state legislatures “under the direct control of Congress.” In reaching this conclusion, the Court rejected the argument that PASPA represented a valid exercise of Congress’s power to preempt state law, reasoning that Congress can preempt state law only in the course of directly regulating private actors and not by directly issuing commands to state governments.

Legal Background: Preemption and Commandeering

The Supreme Court has [made clear](#) that the Constitution does not grant the federal government “general” or “plenary” authority. Rather, “the Constitution lists, or enumerates, the Federal Government’s powers,” and this enumeration “is also a limitation of powers, because the enumeration presupposes something not enumerated.” This [principle](#) reflects the fact that “[u]pon ratification of the Constitution, the States entered the Union ‘with their sovereignty intact.’” The text of the [Tenth Amendment](#) confirms this understanding of the nation’s constitutional structure, providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

While the Constitution limits the federal government’s powers, it also provides that federal law [may displace](#) (or “preempt”) otherwise valid, but conflicting state actions under the [Supremacy Clause](#) when Congress is acting pursuant to its enumerated powers. The Supreme Court has “[long recognized](#)” that federal law can preempt state regulation of a particular activity in whole or in part, and federal law can also [permissibly condition](#) a state’s ability to regulate an activity upon conformity with federal standards. However, the Court has also recognized a [limit](#) on the federal government’s preemption power: under the “anti-commandeering” doctrine, Congress cannot directly compel the state political branches to perform regulatory functions on the federal government’s behalf. The Court has [explained](#) that the anti-

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commandeering doctrine is grounded in the Constitution’s conferral of limited powers on the federal government and the text of the Tenth Amendment.

The anti-commandeering doctrine was explicitly articulated by the Supreme Court in the 1992 case of *New York v. United States*, when the Court struck down a federal law requiring states to either “take title” to radioactive waste or “regulat[e] according to the instructions of Congress.” The Court explained in *New York* that although the Constitution grants Congress broad power “to pass laws requiring or prohibiting certain acts” by *private* actors, the federal government may not “directly . . . compel the States to require or prohibit those acts.” Because the federal law at issue in *New York* required states to either take title to radioactive waste or adopt certain laws, the Court concluded that the federal law unconstitutionally “commandeered” the authority of state governments.

The Court again applied the anti-commandeering doctrine five years later in *Printz v. United States*, striking down a law that required state law enforcement officers to perform background checks in connection with applications for handgun licenses.

Background of *Murphy v. NCAA*

The *Murphy* case centered on the permissibility of PASPA, which made it “unlawful” for most states “to sponsor, operate, advertise, promote, license, or authorize by laws” sports gambling, and New Jersey’s attempts to legalize sports gambling. In 2014, New Jersey enacted a statute partially repealing its prohibition on sports gambling. The state law allows gambling to occur at most New Jersey casinos and racetracks without state penalty, but maintains prior restrictions on (1) sports gambling at other locations, (2) gambling on New Jersey sporting events and collegiate teams, and (3) gambling by persons under the age of 21. (An earlier attempt by New Jersey to legalize and regulate sports gambling had been struck down by a reviewing court as a violation of PASPA, and the Supreme Court had declined to review that decision.)

The NCAA and other sports leagues challenged the 2014 New Jersey law as an “authorization” of sports gambling that violated PASPA. In response, New Jersey argued, among other things, that PASPA unconstitutionally commandeered the New Jersey legislature’s authority. The U.S. Court of Appeals for the Third Circuit (Third Circuit) sided with the NCAA and upheld an injunction preventing the state from giving effect to the challenged law. New Jersey appealed the Third Circuit’s decision to the Supreme Court.

The Supreme Court’s Decision

In *Murphy*, the Court began by addressing a dispute over the meaning of the phrase “authorize by law” in PASPA. The NCAA and the U.S. Office of the Solicitor General (OSG) had argued in favor of the Third Circuit’s narrow construction of that language. The Third Circuit had concluded that, while a full repeal of a state’s sports gambling restrictions would not constitute an “authorization” under PASPA, a partial or selective repeal of sports gambling laws potentially could. Under the theory adopted by the Third Circuit and defended by the NCAA and OSG, New Jersey had “authorized” sports gambling by repealing its ban only as to certain specified entities (casinos and racetracks that complied with applicable regulations).

The NCAA and OSG argued that other types of partial repeals may not qualify as “authorizations” of sports gambling, but did not offer a clear rule for distinguishing between partial repeals that would violate PASPA and those that would not. By contrast, New Jersey argued that PASPA’s “anti-authorization” provision forbade *all* partial repeals of sports gambling bans, and this prohibition of partial repeals unconstitutionally commandeered state authority.

While the Court agreed with New Jersey that a state “authorizes” sports gambling within the meaning of PASPA whenever it partially repeals laws prohibiting sports gambling, it ultimately concluded that PASPA’s “anti-authorization” provision was unconstitutional under either of the proffered interpretations. Under either interpretation, the Court explained, PASPA “dictate[d] what a state legislature may and may

not do,” and accordingly placed state legislatures “under the direct control of Congress.” Reasoning that PASPA’s “anti-authorization” provision was tantamount to installing federal officers “in state legislative chambers . . . armed with the authority to stop legislators from voting on any offending proposals,” the Court remarked that “[a] more direct affront to state sovereignty is not easy to imagine.” In arriving at this conclusion, the Court rejected the NCAA’s argument that there is a significant distinction between Congress telling states what they *must* do and Congress telling states what they *must not* do. The Court characterized this distinction as “empty,” reasoning that “[t]he basic principle that Congress cannot issue direct orders to state legislatures” applies in either case.

The Court proceeded to address two objections to this line of reasoning. **First**, the Court rejected the NCAA’s argument that this conclusion was inconsistent with prior Court decisions upholding federal statutes that affect state decision making in certain ways. Those decisions involved two general types of federal statutes: (1) those regulating activities in which both state governments and private actors engage (*i.e.*, **issuing bonds** or collecting various types of **personal information**), and (2) **those** creating a “cooperative federalism” regime where federal regulatory standards take effect only if a state fails to take certain **prescribed actions**.

The Court explained that laws of the first type—that is, laws regulating both state governments and private actors—do not threaten state sovereignty because they involve only “evenhanded regulat[ion] of an activity in which both States and private actors engage” and not “States’ sovereign authority to regulate their own citizens.” Similarly, the Court concluded that “cooperative federalism” schemes do not threaten state sovereignty because they *allow*, but do not *require* states to implement a federal regulatory program. Rather, if a state does not seek to take an action prescribed by a “cooperative federalism” regime, the “full regulatory burden would be borne by the Federal Government.” Because PASPA’s “anti-authorization” provision was not a regulation “of an activity in which both States and private actors engage” and *required* states to abide by its commands, the Court concluded that it did not fall within either of these categories.

Second, the Court **addressed** the line between commandeering and preemption. The Court explained that the Supremacy Clause (the constitutional provision on which federal preemption is based) is not an independent source of federal power, but rather a “rule of decision” which commands courts to give supremacy to federal law in cases of conflict with state law. Accordingly, Congress can preempt state law only when it is legislating pursuant to an enumerated power. Because Congress’s enumerated powers do not include a power to compel states to adopt federal regulatory programs, the Court explained, PASPA’s “anti-authorization” provision did not represent a valid instance of federal preemption.

Lastly, the Court **analyzed** whether PASPA’s remaining provisions should be invalidated in light of the “anti-authorization” provision’s unconstitutionality. PASPA’s remaining provisions made it unlawful for (1) states to “sponsor, operate, advertise, promote, [or] license” sports gambling, and (2) private persons to “sponsor, operate, advertise, or promote” sports gambling “pursuant to the law or compact of a governmental entity.” The Court reasoned that because Congress would have been unlikely to enact these provisions in the absence of the invalid “anti-authorization” provision, they were not “severable” from the “anti-authorization” provision and were accordingly inoperative.

Justice Thomas joined the Court’s opinion in its entirety, but wrote a **separate concurrence** expressing discomfort with the Court’s severability doctrine. While Justice Thomas agreed that the Court’s opinion “[g]ave the best answer it c[ould]” to the question of whether PASPA’s “anti-authorization” provision was severable from its remaining provisions under current doctrine, he argued that in a future case, the Court “should take another look at [its] severability precedents.”

Justice Breyer also wrote a **separate opinion** concurring with the Court’s opinion in part and dissenting in part. While Justice Breyer joined the Court’s conclusion that PASPA’s “anti-authorization” provision unconstitutionally commandeered state authority, he argued that the provision in PASPA that made it

unlawful for private persons to “sponsor, operate, advertise, or promote” sports gambling “pursuant to the law or compact of a governmental entity” was severable from the “anti-authorization” provision. Justice Breyer also declined to join the portion of the Court’s opinion holding that PASPA’s prohibitions of state sponsorship, operation, advertising, or promotion of sports gambling schemes should be invalidated in light of the unconstitutionality of its “anti-authorization” provision.

Finally, Justice Ginsburg wrote a [dissent](#) joined by Justice Sotomayor in full and by Justice Breyer in part. While Justice Ginsburg dissented from the Court’s holding that PASPA’s “anti-authorization” provision unconstitutionally commandeered state authority, she did not explain the basis for her disagreement on that question. Instead, she argued that even if the Court’s conclusion on the commandeering question was correct, PASPA’s restrictions on private persons and its prohibitions of state sponsorship, operation, advertising, or promotion of sports gambling schemes were severable from its “anti-authorization” provision.

Implications of *Murphy v. NCAA* for Congress

Murphy is a significant case for federal-state relations. The Court’s decision reaffirms the anti-commandeering doctrine as an outer limit on Congress’s power to preempt state law. The Court’s reasoning in *Murphy* may also have important implications for some existing federal statutes. One commentator has [argued](#) that the Court’s reasoning in *Murphy* calls into question the constitutionality of a number of federal statutes limiting state taxing authority. The Court’s decision may also have important implications for pending litigation over state and local “sanctuary” policies concerning immigration enforcement. [Federal law](#) currently prohibits states and localities from “in any way restrict[ing]” the ability of their officials to send information about a person’s immigration status to federal immigration authorities. This statute, which serves as a [lynchpin](#) to federal efforts to deter state and local “sanctuary” policies limiting cooperation with federal immigration efforts, is relevant to a [number of lawsuits](#) between states, localities, and the federal government concerning immigration enforcement matters. The Court’s conclusion in *Murphy* that the federal government may not “dictate” what state governments “may and may not do” may open up new lines of argument concerning the viability of this federal law (though the constitutionality of such state and local restrictions may raise [separate issues](#) under the Supremacy Clause in relation to other immigration statutes).

Naturally, the Court’s decision in *Murphy* also has important implications for the regulation of sports gambling. Because the Court struck down PASPA in its entirety, states are now generally free to adopt sports gambling regulatory schemes that vary considerably in their permissiveness. However, the Court’s [reaffirmation](#) of the permissibility of “cooperative federalism” regimes potentially suggests a way in which Congress may choose to re-enter the fray. Arguably, Congress could replace PASPA with a new statute prohibiting private actors from engaging in sports gambling, with an exception for gambling undertaken pursuant to state regulatory programs that meet certain minimum federal standards. Courts may treat replacement legislation of this sort as analogous to the “cooperative federalism” [schemes](#) the Supreme Court has [endorsed](#) in the past.

Commentators have proposed similar “cooperative federalism” regimes for other issues that implicate delicate issues of federal-state relations, including [marijuana regulation](#). However Congress addresses these and other federalism issues, it will likely be impacted by *Murphy*’s distinction between (1) federal laws that regulate *private* conduct and validly preempt state law, and (2) federal laws that impermissibly commandeer state regulatory authority by dictating what *states* can and cannot do.

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